SUPREME COURT, U. S.

No. 478

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In the Supreme Court of the United States

OCTOBER TERM, 1968

JEREMIAH STAMLER, M.D. and YOLANDA F. HALL,

Plaintiffs-Appellants,

and

MILTON M. COHEN,

Intervening Plaintiff-Appellant,

vs.

HON. EDWIN E. WILLIS, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.

JURISDICTIONAL STATEMENT

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
CHESTER T. KAMIN
DAVID C. ROSTON
RONALD J. CLARK
135 S. LaSalle Street
Chicago, Illinois 60603
ARTHUR KINOY
NANCY STEARNS
511 Fifth Avenue
New York, New York 10017
Attorneys for Plaintiffs-Appellants
Jeremiah Stamler, M.D.
and Yolanda F. Hall

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 S. LaSalle Street
Chicago, Illinois 60603

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6581

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NO.

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vs.

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On Appeal from the United States District Court
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JURISDICTIONAL STATEMENT

Plaintiffs-appellants Jeremiah Stamler, M.D. and Yolanda F. Hall appeal from the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, entered June 26, 1968.

Opinions Below

The opinions of the District Court, majority and dissenting, not yet reported, are attached as Appendix 1, and a copy of the judgment from which this appeal is taken is attached as Appendix 2.

Jurisdiction

This appeal involves two actions which were consolidated by order of the District Court. The first case was filed on May 24, 1965, the day before appellants were to appear pursuant to subpoenaes before a sub-committee of the United States House of Representatives Committee on Un-American Activities (the "Committee") in Chicago, Illinois. The second case was filed in December, 1965, after the Committee's hearings in Chicago were concluded. Both cases were brought by plaintiffs-appellants in the United States District Court for the Northern District of Illinois, Eastern Division, under 28 U.S.C. §§ 1331, 1343(3) and (4), 2201, 2202, 2282, 2284; 42 U.S.C. §1983; and under the Constitution of the United States (Article I, Section 9, Clause 3; Article III; and the First, Fifth, Ninth, Tenth and Fourteenth Amendments).

The original defendants in both cases were the Chairman and the members of the Committee ("the Congressional appellees" or "the Committee members"). The Attorney General of the United States and the United States Attorney for the Northern District of Illinois ("the prosecutors") were subsequently added as parties defendant.

Insofar as pertinent to this appeal, appellants sought (1) a declaratory judgment that the Act of Congress which established the Committee (Rule XI, 18(b), Legislative Reorganization Act of 1946, 60 Stat. 812, 828) is repugnant to the United States Constitution, (2) an injunction prohibiting the Congressional appellees from acting under or

enforcing that Act, and (3) an injunction prohibiting the prosecutors from proceeding with prosecution of indictments obtained by them against appellants for alleged contempt of Congress arising out of the 1965 Chicago hearings.

With one Judge dissenting, the District Court entered on June 26, 1968 its judgment dismissing the consolidated cases as to all appellees. Notice of appeal was filed by appellants on July 5, 1968. By order entered August 30, 1968, the time to docket this appeal was extended to September 3, 1968.

Jurisdiction of this Court to hear this appeal is conferred by 28 U.S.C. §1253. The following cases sustain the jurisdiction of this Court: *United Public Workers* v. *Mitchell,* 330 U.S. 75 (1947); *United States* v. *Georgia Public Service Commission,* 371 U.S. 285 (1963).

Constitutional Provisions and Statutes Involved

Article I, Section 6, Clause 1 of the United States Constitution provides in part:

> "... and for any Speech or Debate in either House, they shall not be questioned in any other Place."

Article I, Section 9, Clause 3 of the United States Constitution provides in part:

> "No Bill of Attainder ... shall be passed."

The enabling Act of the United States House of Representatives Committee on Un-American Activities is a part of the Legislative Reorganization Act of 1946. (60 Stat. 812, 828.) Rule XI, 18(b) of the Act provides as follows:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of Un-American propaganda activities in the United States, (ii) the diffusion within the United

States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Questions Presented

1. Whether a complaint seeking declaratory and injunctive relief against an unconstitutional act of Congress may be dismissed as against the United States Attorney and the Attorney General merely because Congressional-defendants have asserted a claim of immunity under the Speech or Debate Clause and where concededly the prosecutor-defendants have no such claim of immunity and are otherwise proper parties to the action?

2. Whether the Speech or Debate Clause prohibits civil actions against members of Congress to adjudicate the constitutionality of federal legislation?

3. Even if the Speech or Debate Clause is applicable to the relief sought in this proceeding, whether summary judgment may be granted against appellants when a clear issue of fact exists as to whether the activities of the Congressional appellees were legitimate legislative activities?

4. Whether the failure of the Congressional defendants to assert the Speech or Debate Clause as a bar to this action until April, 1968 has resulted in a waiver of any rights or privileges afforded them by that Clause?

5. Even if the Speech or Debate Clause is applicable to the relief sought in this proceeding, whether summary judgment may be granted against the appellants without affording them an opportunity to contest factually the asumption that the Congressional appellees were engaged in legitimate legislative activity?

6. Whether the statutory mandate establishing the Committee on Un-American Activities of the House of Representatives is on its face repugnant to the Constitution of the United States?

STATEMENT OF THE PROCEEDINGS BELOW*

Plaintiffs Jeremiah Stamler, M.D. and Yolanda F. Hall and intervening plaintiff Milton M. Cohen (hereinafter ("appellants")** were subpoenaed to appear before a subcommittee of the United States House of Representatives Committee on Un-American Activities (hereinafter "the Committee") to be held in Chicago, Illinois commencing May 25, 1965. A letter accompanying each subpoena stated that the Committee had received evidence in executive session in which the person subpoenaed was identified as having been a member of the Communist Party. (2 A. 53-54.) Appellants received no information regarding the purpose or subject matter of the hearings.

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* "1 A ——" refers to the Appendix filed in the Court of Appeals for the Seventh Circuit in No. 15268-9; "2 A. ....." refers to the Appendix filed in Nos. 15268-9 and 15668-9 (Consolidated); "Ex. 50, p. ——" and "Ex. 51, p. ——" refer to the printed Supplemental Appendices filed in the consolidated appeals; "— R. ....." refers to the volume and item number of the five volume Record on Appeal filed in this Court.

** Appellant Stamler has long enjoyed a world-wide reputation for his professional research and writings on prevention of heart disease. He is Director of the Chicago Board of Health Division of Adult Health and Aging and Heart Disease Control Program. He was placed upon inactive status the day after he was indicted for contempt of Congress in July 1967. Since 1958 Dr. Stamler has been on the faculty of the Department of Medicine, Northwestern University Medical School, Chicago, and currently holds the rank of Associate Professor. He is Secretary of the Council on Epidemiology and Prevention of the International Society of Cardiology, and Western Hemisphere Editor of the Journal of Atherosclerosis Research. (1 A. 2-3; 2 A. 3-4.)

Appellant Hall is a Research Nutritionist for the Chicago Health Research Foundation, of which Dr. Stamler is the Executive Director. (1 A. 3; 2 A. 4.)

Intervening appellant Cohen is Executive Director of a home for the aged, a not-for-profit corporation operated in conjunction with the Jewish Federation of Metropolitan Chicago. (2 A. 87.)

Appellants' First Action

On May 24, 1965, the day before the Committee hearings were to commence, appellants instituted an action against the Chairman and members of the Committee in the District Court in Chicago in which they sought (i) a declaratory judgment that the Act of Congress (Rule XI) that established the Committee is repugnant to the United States Constitution, (ii) an injunction restraining enforcement of that Act and (iii) an injunction restraining the holding of the scheduled hearings in Chicago. (1 A. 2-14, 38-39; 1 R. 2, pp. 5-55.)

The same day, after oral arguments were heard, the District Judge (Honorable Julius J. Hoffman) dismissed the action pursuant to the Committee's oral motion on the ground that the complaints raised no substantial question of federal law, relying primarily on *Barenblatt* v. *United States,* 360 U.S. 109 (1959). Appellants thereupon appealed to the Court of Appeals for the Seventh Circuit. (1 A. 41-52).

The Hearings

Pursuant to the subpoenas served upon them, appellants and their counsel attended the hearings on May 25, 26 and 27, 1965. The first two witnesses were the Committee's own witnesses ("friendly" witnesses). They testified at length concerning alleged activities of the Communist Party in the Chicago area, particularly among steel mill workers during the 1930's through the 1950's. The Committee had already heard this testimony in executive session.* Neither of the Commttee's witnesses mentioned either Dr. Stamler or Mrs. Hall. The Committee then called the subpoenaed witnesses, reserving Dr. Stamler and Mrs.

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* Both witnesses were undercover FBI agents who infiltrated the Communist Party. Both left the Party in 1963. One had testified before the Subversive Activities Control Board in 1963. (Ex. 50, pp. 301-307, 333, 388.)

Hall until last. All of the subpoenaed witnesses other than appellants refused to answer any except a few preliminary questions. They based their refusals upon multiple grounds including, in every instance, the Fifth Amendment privilege against self incrimination. Nevertheless, Committee counsel put to each of these witnesses a long series of defamatory, leading, "fact"-laden questions. In many instances, over objection of appellants' counsel, Committee counsel asserted as a part of his questions that the Committee had information, which it deemed "reliable," that Dr. Stamler and Mrs. Hall had been members of the Communist Party and had engaged in "subversive" activities.*

The Committee denied or disregarded the objections and protests of appellants' counsel that this deliberately pursued practice impaired the rights of the appellants and the witnesses under the Constitution of the United States, was a gross abuse of the legislative process, was a delib-

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*For example:

"Now, further, in light of the fact that Mrs. Yolanda Hall in the year 1949 was here in Chicago as an admitted Communist—." [Interrupted by objections and colloquy.] (Ex. 50, p. 432.)

"The committee also possesses information, which it believes reliable, that you and Dr. Jeremiah Stamler also were in attendance at a conference held on October 16-17, 1953, titled 'The Chicago Area Conference for World Peace Through Negotiations,' which was held under the auspices of the American Peace Crusade at the Fine Arts Building, Curtis Hall, 410 South Michigan Avenue, Chicago, Illinois. Did you meet or talk with Dr. Stamler on these occasions?" (Ex. 50, p. 508.)

"The committee is informed that, at the time [late 1950] you were contacted by Dr. Stamler you were advised by him that you were one of several persons chosen to give up their identity and to move to new areas to carry on in case Communist Party leaders were put away. Did he tell you that?" (Ex. 50, pp. 534-535.)

See also Ex. 50, pp. 430, 432, 507-8, 511, 524-5, 534.

erate pillorying of appellants and the witnesses, was unsworn accusatory "testimony" of Committee counsel, was gross hearsay, and was for the sole purpose of holding the witnesses and appellants up to public ridicule and defamation.

The Committee also denied the repeated requests of appellants' counsel that all testimony of or concerning appellants be taken in executive session, pursuant to Rule 26(m) of the rules of the House of Representatives.* The hearing room was at all times jammed with spectators, television cameras and operators, news-cameramen, news reporters, and a squadron of marshals.

Mrs. Hall was called to testify on the last day of the hearings. She had not been mentioned in the testimony of any witness. Immediately after being sworn and giving her name, her counsel made a statement to the Committee setting forth the various violations of the United States Constitution and Committee rules which impelled him to advise Dr. Stamler and Mrs. Hall to leave the hearings without further ado. Upon advice of counsel, Mrs. Hall thereupon left the hearing room. (Ex. 50, pp. 537 to 547.)

The Committee then recalled one of its friendly witnesses who, though he testified he had never met Dr. Stamler, was

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* Committee Rule 26(m) provides:

"If the committee determines that evidence or testimony at an investigative hearing may tend to defame, degrade, or incriminate any person, it shall—

"(1) receive such evidence or testimony in executive session;

"(2) afford such person an opportunity voluntarily to appear as a witness; and

"(3) receive and dispose of requests from such person to subpoena additional witnesses."

One of appellants' counsel (Thomas P. Sullivan) orally requested executive sessions and was forcibly seized and thrust down into a chair by marshals at the Chairman's direction. Another of appellants' counsel (Albert E. Jenner, Jr.) was threatened with bodily removal from the hearing room. (Ex. 50, pp. 430-2, 548.)

permitted (over objections) to testify to a derogatory hearsay statement about Dr. Stamler which the witness allegedly overheard in 1959. The Committee denied the request of Dr. Stamler's counsel to cross examine the Committee's witnesses. Dr. Stamler was then called as a witness. After being sworn, upon advice of counsel, he took the same position as had Mrs. Hall, and left the hearing room. (Ex. 50, pp. 549 to 552.)

Appellants' Second Action

Following the hearings, appellants commenced a second action in the District Court against the Committee, in which appellants set forth what had transpired at the hearings. The official printed transcript of the hearings was attached as an exhibit to the complaint. (2 A. 3-83.) In substance the complaint alleged that the misconduct on the part of the Committee, which appellants had anticipated, had in fact taken place; that the course pursued by the Committee at the Chicago hearing was in the pattern of all prior hearings over the years; that the Committee had consistently interpreted Rule XI to authorize that conduct; and that the Committee was engaged in public pillorying of witnesses rather than investigation for purposes of legislation. Appellants sought a declaratory judgment that the Act of Congress establishing the Committee is repugnant to the Constitution, both on its face and by reason of the unconstitutional meaning which has been attributed to it through its enforcement and use by the Committee over the years; an injunction restraining the Committee from enforcing or operating under that Act; a declaratory judgment that the hearings held on May 25-27, 1965 were invalid; and an injunction restraining the Committee from instituting criminal proceedings against appellants for contempt of Congress. (2 A. 3-102; 2 R. 4, pp. 5-127, 141-160.)

In April, 1966, District Judge Hoffman denied appellants' motion that a three-judge court be convened, and granted the Committee's motion to dismiss the second complaint, on the grounds (1) appellants have no standing to maintain the action, (2) the relief available to appellants will not terminate the controversy, (3) the action is barred by the doctrine of separation of powers, and (4) no justiciable case or controversy is presented. (2 A. 117-134.) No claim of immunity under the Speech or Debate Clause was either raised or decided. Appellants' appeal from this ruling was consolidated in the Court of Appeals with the first appeal.*

The Court of Appeals' Ruling

On November 10, 1966, a majority of the Court of Appeals reversed both of the orders of dismissal of the complaints, and remanded with directions that three-judge district courts be convened to hear and determine the cases. (Appendix 3; 3 R. 6.) The court held that the complaints set forth a basis for equitable relief and raised "a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959)." The court contrasted this case with *Barenblatt*, saying, "Here it is alleged that Rule XI, section 18, is unconstitutional as continually interpreted by the Subcommittee to justify the effectual 'pillorying' of plaintiffs and other witnesses." In a footnote, the Court said (371 F.2d 413, 414):

> "Because of the allegations here of the Subcommittee conduct giving an unconstitutional meaning to the statute, this case is distinguished from those where unconstitutional conduct under color of a valid statute is

* Prior to the commencement of the second action, the Committee had moved to dismiss appellants' first appeal on the grounds of mootness, lack of subject matter jurisdiction, and lack of a justiciable controversy. The Court of Appeals denied this motion.

alleged. *Ex parte Bransford,* 310 U.S. 354 (1940). It is well established that the meaning of a statute must not be derived solely from its abstract terms, 'unrelated to the definite content furnished them by the course of congressional actions.' *Barenblatt* v. *United States,* 360 U.S. 109, 117 (1959)."

The Committee's petition for rehearing *en banc* was denied on February 13, 1967 (two Judges dissenting).*

Issuance of the Court of Appeals' mandate was delayed for over three months on motions of the Committee's counsel while they considered whether to file a petition for writ of certiorari in this Court. No petition was filed, the mandate was issued in May, 1967, three-judge district courts were convened to hear both cases, and the cases were consolidated for trial. (3 R. 7-9.)

The Indictments

In October, 1966, while appellants' appeals were under advisement in the Court of Appeals (and 17 months after the Chicago hearings), a majority of the House of Representatives passed resolutions that the Speaker certify to the United States Attorney in Chicago reports of the Committee as to plaintiffs' refusal to testify before the

* In the petition for rehearing (pp. 29-34), the Committee raised for the first time the contention that adoption of contempt resolutions by the House of Representatives (referred to below), which occurred while the appeals were under advisement, rendered the case moot. Again no argument was made that the Speech or Debate Clause barred appellants' action.

Committee, in alleged violation of 2 U.S.C. §192.*

On July 18, 1967 (8 months after the House passed the resolutions), appellants were indicted by the grand jury for the Northern District of Illinois under 2 U.S.C. §192. (67 CR 393, 394, 395.)**

Rulings of the Three-Judge Court in the Civil Case

Following return of the indictments, the three-judge court (Judge Hoffman dissenting) reversed the orders previously entered by Judge Hoffman and granted appellants' motions (i) to add the prosecutors as parties defendant, and (ii) to file a supplemental complaint setting forth the indictments and resulting harm which has befallen appellants and their families. In the supplemental

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* 3 R. 12; 112 Cong. Rec. 27495, 27506 (1966). Statements in opposition to the resolutions, signed by thousands of scientists, physicians, lawyers, clergymen and other professional people were presented to the House (112 Cong. Rec. 27462-84 (1966)), and opposition to the Committee on the House floor, both in speech and vote, reached an all time high.

In the vigorous and extended floor debate concerning these resolutions, it was revealed that the Committee had surreptitiously engaged in the practice of compensating its friendly witnesses following the giving of their testimony. (112 Cong. Rec. 27439-62, 27448-9, 27451, 27484-513, A. 5402-3 (1966).)

** The three criminal cases have been consolidated for trial and are pending before Hon. Abraham L. Marovitz. In Judge Marovitz's absence from the country, Hon. Richard B. Austin denied the motion of defendants (appellants in the case at bar) to stay proceedings in the criminal cases pending this appeal. A similar motion is under advisement before the three-judge Court at the time this brief is filed (Sept. 5, 1968).

Pre-trial motions have been filed in the criminal cases, and those motions are now being briefed. Judge Marovitz has set the motions for disposition on October 24, 1968, and the trial for November 12, 1968.

complaint, plaintiffs pray for a permanent injunction restraining prosecution of the indictments. (4 R. 50.)*

Appellees moved to dismiss the complaints as supplemented on multiple grounds, including lack of standing and justiciability, separation of powers, mootness, the ruling of this Court in *Barenblatt* v. *United States,* 360 U.S. 109 (1959), and lack of right to equitable relief to prevent criminal prosecutions. Appellees did *not* include a claim of privilege under the Speech or Debate Clause. After receiving briefs and oral argument (3 R. 31-38; 4 R. 44), the three-judge court *unanimously* denied appellees' motion to dismiss, and directed all appellees to answer the complaint (4 R. 52, Nov. 8, 1967.)

Thereafter, appellees filed answers to the complaints in which many of the material allegations thereof are denied, and affirmative matters are set forth. The answers contain ten affirmative defenses. *The Speech or Debate Clause is not referred to or relied upon in the answers.* (4 R. 56; 5 R. 68.)

The appellees then filed a motion for summary judgment with affidavits in support thereof, the purport of which are that (1) the hearings held in Chicago, Illinois in May, 1965 were duly authorized by the House of Representatives and by the full Committee, and (2) the Committee members and its employees are not responsible

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* In denying appellants' motion to join the prosecutors as defendants, Judge Hoffman stated that ". . . I cannot find that without the [prosecutors], complete relief cannot be accorded [appellants] . . ." Several days later, Judge Hoffman inconsistently denied appellants' motion for a temporary restraining order to prevent presentation of the contempt resolutions to the grand jury on the ground that such an order would be ineffective since the prosecutors were not parties to the case. (4 R. 53 pp. 96, 110-122; see further, 3 R. 39, 4 R. 41-43, 46-49.)

for the divulgence of appellants' names to the press prior to the opening of the hearings. Again no claim of congressional privilege was made. Appellants filed affidavits in opposition with respect to the pre-hearing release of names of subpoenaed witnesses, and the Court took the motion for summary judgment under advisement on briefs. (4 R. 62-63; 5 R. 70-73, 76, 78.)

Appellants served written interrogatories and a motion for production of documents, which the Court took on briefs. (4 R. 55, 59, 64-66; 5 R. 69, 72-73, 77, 80.) On March 1, 1968, the Court unanimously denied appellees' motion to stay discovery pending disposition of the motion for summary judgment, and directed appellees to respond to certain written interrogatories and to produce certain documents commencing April 12, 1968. (5 R. 86.) Appellants then served notice for the taking of the depositions of the Staff Director and two investigators of the Committee. (5 R. 85.)

Thus, with the case almost three years old, the pleadings at issue and discovery under way, the appellees had not interposed (either in the trial court or on appeal) a claim of congressional privilege based on the Speech or Debate Clause of the United States Constitution.*

On April 3, 1968, the Congressional appellees filed a motion to dismiss the complaints "by reason of Article I, Section 6, Clause 1 of the United States Constitution," the Speech or Debate Clause, and each Congressional defendant submitted a "Claim of Privilege and Exemption

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* That Clause had not been overlooked however. In the motion to dismiss appellants' first appeal, and in various briefs filed by the Committee, the Speech or Debate Clause was mentioned in a makeweight argument that appellants could not maintain an action for *recovery of damages* against the Congressional appellees.

From Suit." Appellees requested that discovery be stayed pending the ruling on this motion, and prayed for certain other protective orders with regard to pre-trial discovery.

The prosecutor-appellees did not move to dismiss or claim a privilege or exemption from this suit. The Court took these motions under advisement on briefs, and stayed discovery until the end of June, 1968. (5 A. 90-97.)

On June 26, 1968, a majority of the three-judge Court entered summary judgment dismissing appellants' action as to all appellees on the grounds (i) that appellants' action against the Congressional appellees was barred by the Speech or Debate Clause, and (ii) that the action against the prosecutors was "ancillary" to the action against the Congressional appellees. (Appendix 1 to this brief; 5 R. 98.) The majority observed that this Court has never ruled on the issues presented by the motion to dismiss, namely, "whether the legislative immunity provided by the Speech or Debate Clause may be asserted in an action seeking only equitable relief and a declaratory judgment, and in an action brought to redress a deprivation of First Amendment rights." The Court conceded that the Speech or Debate Clause did not deprive the Court of jurisdiction of plaintiffs' action, and that in order for that Clause to protect a legislator, "it must be demonstrated that he is engaged in a legitimate legislative activity." The Court stated that the determination of this question "is more appropriate in a summary judgment setting," and that "we have treated the Claims of Privilege and Exemption from Suit as affirmative defenses to the actions and find, on the defendants' motion for summary judgment, that the Speech or Debate Clause is a complete legal defense to both ac-

tions. In view of the fact that these cases were commenced more than three years ago, the Court will not require amended pleadings or new motions for summary judgment presenting the defense of immunity to the Court. We will treat the motion of the Congressional defendants to stay discovery and dismiss the actions under the pending motion for summary judgment and allow both motions of the Congressional defendants. The relief sought against the Attorney General and the United States Attorney is ancillary to the claims against the Congressional defendants and the actions will be dismissed as to the Attorney General and the United States Attorney."

Thus, because of the unorthodox procedure adopted by the majority, appellants were never afforded an opportunity either to submit counter-affidavits on the question of whether the activities of the Congressional appellees brought them within the scope of the Speech or Debate Clause, or to brief the question of whether summary judgment was appropriate.

In dissent, Circuit Judge Walter J. Cummings, Jr. pointed out:

First, the Speech or Debate Clause was not intended to apply to civil cases involving the constitutionality of legislation, where no monetary damages or other personal relief is sought.

Second, through "belated resort to the Speech or Debate Clause, this Court should not evade the mandate of *Stamler* v. *Willis,* 371 F.2d 413 (7th Cir. 1966), holding that this complaint presents a substantial constitutional question, and that the breadth of Rule XI should be measured against this Committee's conduct over the years . . ."

Third, "... the *Stamler* opinion contemplated that this judicial reexamination was to occur in this proceeding rather than in subsequent criminal proceedings. . . . these plaintiffs, like those in *Dombrowski* v. *Pfister,* 380 U.S. 479, should be permitted to raise these questions in a civil proceeding not inhibiting the full exercise of their First Amendment rights. They should not have to go through years of criminal litigation as in *Gojack* v. *United States,* 384 U.S. 702, where the defendant had to stand trial twice, was convicted twice, appealed unsuccessfully twice, obtained a new trial from the Supreme Court and finally the dismissal of charges against him in the Supreme Court."

Fourth, "Even more than in *Dombrowski* v. *Pfister, supra,* these plaintiffs are entitled to an adjudication of their civil complaint. There the allegedly overbroad statute was new and had not been judicially construed, so that any threat to free expression might have been obviated *ad limine.* Here it is alleged that the interpretation put on Rule XI during the approximately 30 years of the the Committee's existence exacerbates the overbreadth of the Rule, and it has already been held that plaintiffs' allegations raise a substantial constitutional question *(Stamler* v. *Willis, supra).* Therefore, *Dombrowski* surely requires this Court to permit this civil litigation to proceed."

Fifth, the majority erred in dismissing the action against the prosecutors.

Appellants filed a notice of appeal to this Court under 28 U.S.C. §1253.

SUMMARY OF THE PLEADINGS

The following is a summary of the allegations contained in appellants' two complaints (1 R. 2; 2 R. 4):

The Committee's legislative charter, Rule XI, is so vague and sweeping that it is unconstitutional on its face. Moreover, the course of conduct engaged in by the Committee over the years, including its conduct during the 1965 Chicago hearings, has given a content and meaning to Rule XI which render it repugnant to the First and Fifth Amendments, to the Bill of Attainder Clause (Article I, Section 9, Clause 3), and to Article III of the Constitution.

The Committee has used Rule XI publicly to expose personal opinions and associations of private citizens and groups, particularly those whose economic, political and social philosophies differ from those of a majority of the Committee, and has visited public scorn and obloquy upon those persons and groups, and deterred them and others in the free exercise of their First Amendment freedoms. Many citizens fear the risk of being called before the Committee, and in order to avoid that risk they forego exercise of their rights of freedom of speech, assembly, petition and other rights guaranteed them by the United States Constitution.

The hearings held in Chicago typify the way in which Rule XI has been used by the members of the Committee over the years. Prior to the hearings, the Committee or its agents deliberately released to the news media the names of appellants and other persons subpoenaed to appear before the Committee in May, 1965 in Chicago. The resulting publicity caused great harm to appellants in their professional and private lives and reputations.

The hearings held in Chicago in May, 1965 served no legitimate legislative purpose, since the only testimony received by the Committee was from its two friendly witnesses who had already been heard by the Committee in executive session. Moreover, about one-half of the questions and testimony related to events which allegedly occurred prior to 1960,* and which were so stale and outdated as to be of no assistance to the Committee or the Congress in carrying out a legislative function.

The Committee violated Rule 26(m) of the House of Representatives in refusing to grant executive sessions as to all testimony by or concerning appellants, despite the knowledge of the Committee and its counsel that inquiries would be put to witnesses which were defamatory of appellants, including allegations that they had been active members of the Communist Party.

The subpoenaed witnesses made it clear from the outset that they did not intend to answer the leading and defamatory questions put to them by Committee counsel. Those question did not elicit any information, and served only to bring public embarrassment and scorn upon the witnesses and others who were mentioned in the questions.

The Chicago hearings were conducted in so tumultuous and undignified a manner, and deviated so radically from minimum standards of orderly procedure, that witnesses could not reasonably be expected to attend and answer the Committee's questions.

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* All of the Committee's questions regarding appellants related to alleged pre-1958 events. It is alleged in the complaints that Mrs. Hall was subpoenaed at the instigation of a group of Chicago area property owners who are opposed to her efforts in behalf of Negroes' civil rights.

At the time appellants were called to testify by the Committee, they had not been given any explanation of the purpose of the hearings or why they had been called to testify before the Committee, so that they were unable to determine the thrust of the hearings or relevancy of any question which might be put to them; Mrs. Hall's name had not been mentioned in testimony, and Dr. Stamler had been referred to in a single hearsay reference; appellants had been denied the right to cross examine the Committee's witnesses or to examine the Committee's evidence concerning them; they had been named by Committee counsel in many defamatory but unanswered questions; they had wrongfully been denied executive sessions; and their counsel had been physically abused and threatened.

Great harm has befallen appellants as a result of the Committee's conduct, namely, (1) Dr. Stamler and Mrs. Hall were required to sign unique loyalty oaths in order to retain their employment, (2) threats of violence have been made to Dr. Stamler because of the legal position he took before the Committee, (3) Mrs. Hall's employer has given consideration to whether she should be dismissed from her employment, (4) upon return of the criminal indictments, Dr. Stamler was placed upon inactive non-salaried status by the Board of Health and his salary placed in escrow, and (5) Dr. Stamler's important medical research has been jeopardized as a result of the Committee's activities.

In their answers (4 R. 56; 5 R. 68), appellees deny many of the allegations of appellants' complaints, and they set out the affirmative defenses of lack of jurisdiction of subject matter and parties, adequate remedy in the criminal cases and mootness. In addition, the prosecutors aver that the doctrine of separation of powers renders them immune from the Court's injunctive powers.

In addition to the foregoing pleadings, the parties have filed affidavits regarding appellees' motion for summary judgment, which place at issue the question of whether the Committee was responsible for the pre-hearing release of witnesses' names. (5 R. 70, Items M to P; 5 R. 76, affidavits of appellants, Gutman, Stearns and Shufro.)

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Introduction

This case is in an extraordinary posture. The Court of Appeals for the Seventh Circuit ruled in 1966 that appellants' complaints set forth substantial constitutional questions and present *prima facie* grounds for equitable relief, and directed that three-judge courts be convened to hear the cases. The court held that the Committee's charter, Rule XI, should be read and interpreted in the context of the Committee's conduct over the years, and that this judicial examination should occur in this civil proceeding. (Appendix 3.) The Committee had full opportunity to seek review of this decision in this Court, but did not do so.

In 1967, a majority of the three-judge court convened pursuant to the Court of Appeals' mandate directed that the prosecutors be added as parties defendant, and unanimously rejected a host of grounds submitted in support of the appellees' motion to dismiss the complaints.

Thus, as the case was about to enter its fourth year, the pleadings were at issue and pre-trial discovery was under way. It was at this juncture that, for the first time, the Speech or Debate Clause of the United States Constitution was interposed as a bar to appellants' action against the Congressional appellees.

In June, 1968, without giving appellants an opportunity to submit counter-affidavits, a majority of the three-judge court ruled that the motion to dismiss would be treated as a motion for summary judgment, and dismissed the complaints upon the basis of a novel interpretation of the Speech or Debate Clause, coupled with a ruling that dismissal of the Congressional appellees somehow required dismissal of the prosecutors. Appellants' entire action was abruptly terminated on the eve of trial after more than three years of active and hotly contested litigation involving serious and fundamental federal constitutional issues.

In light of this background, there is justification for Circuit Judge Cummings' charge, in his dissenting opinion, that the majority of the three-judge court "through belated resort to the Speech or Debate Clause" has attempted to evade the mandate of *Stamler* v. *Willis,* 371 F.2d 413 (7th Cir. 1966). Judge Cummings added:

> " . . . this Court has already unanimously denied the Government's motion to dismiss and permitted limited discovery and should not now back-track from the forthright position previously taken merely to avoid passing upon the difficult and weighty questions presented."

The issues tendered by this case go far beyond the personal interests of the three appellants. Those issues involve basic questions of federal constitutional law, not the least of which is whether citizens whose First Amendment rights have allegedly been trammelled by a committee of Congress are entitled, under the principles enunciated by this Court in *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965), to seek vindication of those rights in a civil rather than a criminal forum. Also involved is the far-reaching question of whether the House Committee on Un-Ameri-

can Activities has so consistently used its charter to pillory witnesses and chill free exercise of First Amendment rights that it has given a meaning to that charter which renders it repugnant to the United States Constitution.

Appellants urge that this Court summarily dispose of this last minute effort to evade the mandate of the Seventh Circuit, and remand the cause for trial on the fundamental issues involved, or in the alternative hold that the Committee's charter is repugnant to the Constitution of the United States (see Part III below).

I.

THE COURT BELOW WAS CLEARLY WRONG IN DISMISSING THIS ACTION AGAINST THE ATTORNEY GENERAL AND THE UNITED STATES ATTORNEY.

The majority of the court below ruled, *sua sponte*, and without having afforded appellants an opportunity to be heard on the issue, that appellants' action against the prosecutors is "ancillary" to their action against the Congressional appellees, and that dismissal of the Congressmen therefore required dismissal of the prosecutors. The court cited no authority whatever, and offered no explanation of the meaning of the word "ancillary" as applied here.

The majority's reason for dismissal of the prosecutors is contradictory of an earlier ruling by the three-judge court. District Judge Hoffman, who wrote the majority opinion below, had ruled in July, 1967 that an injunction against the Congressional appellees would not preclude prosecution of the criminal cases because the order would not bind the prosecutors. It was upon the basis of this very ruling that appellants persuaded the full three-judge

court to reverse Judge Hoffman's denial of the motion to add the prosecutors as parties defendant. Their presence as defendants was necessary to an effective restraint of the prosecution of the indictments.

Accordingly, since the time that the indictments were returned against appellants in July, 1967, the prosecutors have become important and in fact necessary defendants.

In *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880), and *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), this Court held that the Speech or Debate Clause barred civil actions for damages against congressmen, but permitted the actions to continue against non-congressional defendants. If the cause of action in *Kilbourn* against the House Sergeant at Arms was not "ancillary" to the suit against the congressmen, and if the cause of action in *Dombrowski* against Committee counsel Sourwine was not "ancillary" to the suit against Senator Eastland, then by the same token appellants' causes of action against the United States Attorney and the Attorney General are not "ancillary" to their suits against the members of the Committee.

Moreover, the prosecutors did not claim protection under the Speech or Debate Clause; nor did they join in the motion to dismiss made by the Congressional appellees in April, 1968; nor did the majority of the court below seek to justify dismissal of the prosecutors on the Speech or Debate Clause or any other privilege.

The majority's only justification for dismissal of the action against the prosecutors was the *sua sponte* and wholly unsupported and unexplained "ancillary" concept. Therefore, unlike *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), and *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880),

this case involves no question of whether the privilege created by the Speech or Debate Clause immunizes the prosecutors, as non-members of Congress, from appellants' suit.

A judgment against the prosecutors — with or without the Congressional appellees as parties — can afford appellants all of the relief they request, including a declaratory judgment that Rule XI is unconstitutional, and an injunction restraining prosecution of the criminal cases pursuant to the principles expressed in *Dombrowski* v. *Pfister*, 380 U.S. 479 (1965) and *Ex Parte Young*, 209 U.S. 123 (1908); see also *Reed Enterprises* v. *Corcoran*, 354 F.2d 519 (D.C. Cir. 1965); *United States* v. *Wood*, 295 F.2d 772 (5th Cir. 1961).

The majority of the court below was clearly wrong in ruling that appellants' action against the prosecutors is "ancillary" to their action against the Congressional defendants and therefore must be dismissed if the Congressional appellees are immunized from suit by the Speech or Debate Clause.

The three-judge court has already determined that appellants' complaints set forth a valid cause of action against the Attorney General and the United States Attorney. The judgment dismissing appellants' complaints as to the prosecutors should be reversed and the cause remanded to the three-judge court with directions that the case proceed to trial.

II.

THIS APPEAL PRESENTS NOVEL AND IMPORTANT ISSUES REGARDING THE SPEECH OR DEBATE CLAUSE OF THE UNITED STATES CONSTITUTION.

A.

The Speech Or Debate Clause Was Not Intended To Prohibit A Civil Action Against Congressional Defendants Wherein the Plaintiff Does Not Seek Damages Or Other Personal Relief Against the Defendants, But Rather Asks the Court To Adjudicate the Constitutionality of An Act of Congress Which the Congressional Defendants Are Enforcing.

This Court has held that the Speech or Debate Clause prohibits civil suits for damages against members of Congress where the plaintiff's cause of action arises out of legitimate legislative activities. *Kilbourn* v. *Thompson,* 103 U.S. 168 (1880); *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967). The Court has never *expressly* ruled, however, upon the question whether that clause precludes civil actions, such as the case at bar, in which the plaintiff seeks a declaratory judgment as to the constitutionality of an Act of Congress, injunctive relief against members of Congress and other officials who are enforcing the Act, but does not seek damages or any other personal relief.

Several recent decisions of this Court lend strong support to the view expressed by Circuit Judge Cummings in his dissenting opinion (Appendix 1) that the Clause is inapplicable in cases such as this. *Bond* v. *Floyd,* 385 U.S. 116 (1966), and *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965)

were suits in which this Court awarded declaratory judgments and injunctive relief against members of state legislatures. See also *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La. 1961), aff'd. 367 U.S. 908.* It would be impertinent to suggest that the members of this Court were unaware of, overlooked, or intended impliedly to overrule the holding of *Tenney* v. *Brandhove,* 341 U.S. 367, 372-376 (1951) that state legislators are protected by a common law privilege from civil suits commensurate with that afforded federal congressmen by the Speech or Debate Clause. Likewise it would be impertinent to suggest that in those cases the attorneys for the defendant-legislators failed to assert a complete defense available to their clients.

There is a simple explanation as to why this Court and the defendants in those cases did not assert that the legislative privilege of the Speech or Debate Clause was a bar to suit. It is the same reason why, for almost three years, the Congressional appellees in the case at bar made no claim of privilege—the privilege was not intended and (until the decision of the court below was rendered) has never been held to preclude equity actions involving the constitutionality of legislation, in which no personal relief is sought against the legislator-defendants.**

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* Lower federal courts too have granted equitable relief against state legislators. *Jordan* v. *Hutcheson,* 323 F.2d 597 (4th Cir. 1963); *Liveright* v. *Joint Committee,* 279 F.Supp. 205 (M.D. Tenn. 1968).

** In *Powell* v. *McCormack,* 395 F.2d 577 (D.C. Cir. 1968), petition for certiorari pending No. 138, Judge Berger stated "it would seem that, although we need not decide," the Speech or Debate Clause barred an action to require the House of Representatives to seat an elected member. (395 F.2d at 602.) This dictum was not concurred in by the other two members of the court. *Powell* is inapposite in any event because the plaintiffs in that case sought a mandatory injunction to require members of the House to seat Powell.

Upon the basis of a general dictum in *Tenney,* the majority of the court below held that the Speech or Debate Clause was intended to protect members of Congress from having to retain counsel to defend *any kind* of civil action in which legislative activities are involved. But as Circuit Judge Cummings observed in his dissenting opinion, the Committee members are entitled to have government counsel defend them in cases such as this — as was done in the case at bar — under 2 U.S.C. §118. They therefore run no risk of personal cost of suit or of personal liability.

The Speech or Debate Clause has its roots in English history. Its purpose was to enhance and further legislators' freedom of action by prohibiting suits in which they might be held liable, civilly or criminally, for their legislative activities. This salutary purpose will not be impinged upon by permitting litigation concerning the constitutionality of legislation, in which government attorneys represent the legislators without charge, and in which there is no risk of personal liability on the part of the legislators.

In *Kilbourn* and *Tenney,* this Court relied in part on the Massachusetts case of *Coffin* v. *Coffin,* 4 Mass. 1 (1808), in which the Supreme Judicial Court of Massachusetts construed that state's constitutional Speech or Debate Clause. That same court recently passed upon the issue now before this Court. In assessing this decision, it should be noted that the Massachusetts constitutional provision is broader than the federal Speech or Debate Clause. In *Luscomb* v. *Bowker,* 334 Mass. 468, 136 N.E.2d 192 (1956), plaintiff was named as a member of the Communist Party in a report about to be filed by a Massachusetts legislative commission formed under a charter

similar to Rule XI. Plaintiff brought suit against the members of the commission for a declaratory judgment and injunctive relief to expunge the report and to prevent its publication. After discussing *Kilbourn, Tenney, Coffin* and other cases, the court said (136 N.E.2d at 197):

> "In none of the authorities above cited do we find any support for the proposition that a member of the legislature is exempt from suit by an individual designed to test the constitutionality of action of the legislator."

Members of the other branches of government have no sweeping privilege such as that created for legislators by the Court below. For example, the executive branch has an absolute privilege from civil damages suits arising from official action. *Barr* v. *Matteo,* 360 U.S. 564 (1959). But that privilege has never been held to bar actions against high-ranking executive officers for declaratory judgment to determine the constitutionality of the act under which the officer is acting, or the legality of his conduct, and for appropriate injunctive relief.*

Similarly, the judiciary has long been held to enjoy a broad immunity from civil damage suits. *Bradley* v. *Fisher,* 80 U.S. (13 Wall.) 335 (1871); *Pierson* v. *Ray,* 386 U.S. 547 (1967). This immunity, however, has not been held to preclude courts from adjudicating the validity of judicial action and granting affirmative relief in mandamus actions in which the judge himself is the defendant. E.g., *LaBuy* v. *Howes Leather Co.,* 352 U.S. 249 (1957).

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* E.g., *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803), (Secretary of State); *Katzenbach* v. *McClung,* 379 U.S. 294 (1964) (Attorney General of the United States); *Currin* v. *Wallace,* 306 U.S. 1 (1939) (Secretary of Agriculture); *Zemel* v. *Rusk,* 381 U.S. 1 (1965) (Secretary of State); *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952) (Secretary of Commerce).

The holding of the majority of the court below, if accepted, would seriously undermine the rule of *Marbury* v. *Madison,* 5 U.S. (1 Cranch) 137 (1803) that federal courts have power to determine whether legislation of the Congress is consistent with the Constitution. The federal courts' jurisdiction to exercise that power is not vitiated because the persons who are enforcing the legislation, and who therefore are proper defendants in a civil action to enjoin enforcement of the legislation, happen to be members of Congress.

By granting immunity to the Committee members, and dismissing the prosecutors as well, the court below has remitted appellants to their defenses in the pending criminal cases and deprived them of the opportunity of obtaining relief in a civil forum under the principles of *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965). Those salutary principles have thereby been stultified by the ruling of the majority below. This Court has recognized that defense of a criminal case may not insure vindication of First Amendment rights, and that the criminal judgment often does not resolve the basic issues. *Baggett* v. *Bullitt,* 377 U.S. 360, 378 (1964); *Dombrowski* v. *Pfister,* 380 U.S. 479, 490-491 (1965). Even the successful defense of a criminal prosecution may be inadequate to protect First Amendment rights. Compare *Cramp* v. *Board of Public Instruction,* 368 U.S. 278, 284 (1961). Appellants are entitled to an adjudication of the merits of their claim (which the court below unanimously upheld against a previous motion to dismiss) that they are entitled to relief in this civil case rather than having to defend the criminal indictments.

We respectfully submit that the Court should note jurisdiction to resolve the novel and substantial question presented here as to the application of the Speech or Debate Clause in cases such as this.

B.

Entry of Summary Judgment Was Erroneous Because (1) There Is An Issue As To Whether the Activities of the Committee Members Were Legitimate Legislative Activities So As To Bring Them Within the Protection of the Speech Or Debate Clause, (2) The Committee Members Waived Any Privilege or Exemption From Suit Afforded Them By The Clause, and (3) Appellants Were Improperly Deprived of the Right To Submit Affidavits In Opposition To Appellees' Motion.

Even if it is assumed, *arguendo,* that the Speech or Debate Clause is applicable in cases such as this, there is presented on this record the question whether the court below correctly entered summary judgment for the Congressional appellees (and perforce for the prosecutors).

(1)

The majority of the court below erred by ignoring the issue of fact as to whether the activities of the Congressional appellees, upon which this action is based, are within the purview of the Clause which protects legislators while "acting in the sphere of legitimate legislative activity." *Tenney* v. *Brandhove,* 341 U.S. 367, 376 (1951).

Thus, the Speech or Debate Clause does not afford limitless license to members of Congress. The boundaries of the privilege are established by the courts, not the legisla-

ture, as this Court said in *Tenney* v. *Brandhove,* 341 U.S. 367, 376-7 (1951):

> ". . . The House of Commons' claim of power to establish the limits of its privilege has been little more than a pretense since *Ashby* v. *White,* 2 Ld. Raym. 938, 3 id. 320. This Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role. [Citing cases.]"

Neither does the power of Congress to conduct investigations grant a *carte blanche* to legislators. As Mr. Justice Brennan said in *Hutcheson* v. *United States,* 369 U.S. 599, 624 (1962) (concurring opinion):

> ". . . Investigation conducted solely to aggrandize the investigator or punish the investigated, either by publicity or by prosecution, is indefensible—it exceeds the congressional power: exposure for the sake of exposure is not legislative inquiry."

In *Dombrowski* v. *Eastland,* 387 U.S. 82 (1967), this Court held that summary judgment was improperly entered in favor of counsel to a legislative committee against whom damages were sought. There, as here, a genuine issue of fact existed as to whether the conduct in question was protected by the privilege, hence the plaintiffs were entitled to go to trial on that issue. (387 U.S. at 84-85.)*

The Court of Appeals for the Fifth Circuit reached the same conclusion in a related case, *Pfister* v. *Arceneaux,* 376 F.2d 821 (5th Cir. 1967), a civil action for injunctive relief and for damages brought against members of a state legislative investigating committee (376 F.2d at 823):

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* As to the Congressional defendant, Senator Eastland, the Court found no genuine fact issue: "The record does not contain evidence of his involvement in any activity that could result in liability." (387 U.S. at 84.)

> ". . . Resolution of this issue i.e., whether Pfister made such a statement and whether it was accurate has a serious bearing on the question whether Pfister and the other members of the committee were 'acting in the sphere of *legitimate* legislative activity', which would entitle them to immunity." (Emphasis the Court's.)

Similarly, in the case at bar, the disputed issues of fact concerning the course of conduct engaged in by members of the Committee have a bearing upon whether they were engaged in legitimate legislative activity which entitled them to immunity. See also *Wheeldin* v. *Wheeler*, 373 U.S. 647, 650-1 (1963), dealing with an investigator for the Committee, and *Hughes* v. *Johnson*, 305 F.2d 67, 70 (9th Cir. 1962), dealing with immunity from liability of federal game wardens.

The complaints aver that the activities of the Committee members pursuant to Rule XI were *not* legitimate legislative activities, and had no legislative purpose, but rather were unlawful acts which resulted in pillorying of and injury to witnesses, and a chilling of free exercise of First Amendment rights by the entire citizenry. The appellees denied these allegations, thus placing them in issue. There are no affidavits directed to this point. These pleadings create a fact issue which cannot be determined without trial. The majority of the court below concedes this to be true, saying:

> " . . . These exhibits [filed by the appellees] do not disprove plaintiffs' allegations that the conduct of the Committee gives an unconstitutional gloss to House Rule XI . . . ".

The kinds of extraordinary activity pursued by this Committee since its inception defy summary description. Under cover of a paper-thin facade of legality—which has been paid greater lip service since *Watkins* v. *United*

States, 354 U.S. 178 (1957) — the Committee fulfills no legitimate legislative function, and instead assumes the role of the official exposer of supposedly "subversive" persons, ideas and organizations, and as a grand jury inquiring into and deciding political orthodoxy. Exposure and pillorying — of people, ideas and groups — is an end in itself, and the only real end of the Committee's hearings.* The legislative product of the Committee's labors is miniscule; it is summarized in Appendix 4, pp. 148 to 154. But the injury worked by the Committee upon witnesses and their families, upon organizations of citizens, and upon the free flow of ideas in this country, is incalculable. So that the Court will know this is not mere rhetoric or hyperbole, we have set out in Appendix 4, specific examples of reprehensible Committee conduct during hearings conducted in the past 20 years, as well as reports of the harm done to citizens of this country by the unlawful course of the Committee's conduct.

In addition, appellants have commissioned a scientific sampling of the official transcripts of the 174 hearings held by the Committee from 1946 through 1967. The study was conducted by Hans Zeisel, Professor of Law and Sociology of the University of Chicago Law School, who is a world renowned expert in this field. The preliminary results of the study are set forth in full in Appendix 5. Three conclusions stand out:

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* ". . . Lacking these casualties, the people whose reputations and livelihoods have been blithely hazarded, the Committee's career would lack meaning. They are its achievement. It has established a record not of laws but of Fifth Amendment pleas and contempt citations and disrupted lives. The proudest exhibit of the Committee's thirty years is its spacious files filled with the names, associations, activities, and public utterances of thousands of Americans." Goodman, *The Committee* (Farrar, Straus and Giroux, 1968), p. 493.

First, the Committee has obtained virtually no information concerning "subversive" and "un-American" activities from the more than 2,000 non-Committee witnesses called before it.*

Second, thousands of pages of the Committee's transcripts are devoted to Committee counsel and members of the Committee putting long series of leading, defamatory and accusatory questions to non-Committee witnesses, which the witnesses repeatedly refuse to answer.

Third, almost 90% of the questions put to unfriendly witnesses (most of which went unanswered) relate to the witnesses' political, social and economic views, associations and activities, as distinguished from criminal or unlawful conduct.

These conclusions become even more striking when one considers that the Committee's own "friendly" witnesses, almost without exception, have given their testimony to the Committee in executive session before being called in public.

The ultimate conclusion from these facts is, as charged in appellants' complaints, that *the Committee is not engaged in any legitimate legislative investigation, but rather has and is engaged in a process of public exposure and pillorying of citizens whose political, social and economic beliefs are deemed "subversive" by the Committee.* The harmful effects of this misguided course of conduct upon the free exercise of First Amendment rights by our citizens is incalculable.

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* Apart from the 1966 Ku Klux Klan hearings, only 3% of all questions dealing with alleged misdeeds elicited positive information that was not more than 5 years old. (Appendix 5, p. 23; computation based on Table 17.)

The majority of the court below asserted that "plaintiffs challenge the motive of the defendants." The short answer is found in Judge Cummings' dissent:

> ". . . It is the effect of their conduct that is at issue here, not their motives."

The Speech or Debate Clause does not shield members of Congress from judicial scrutiny into unlawful conduct. Appellants are prepared to prove the Committee's continued course of unlawful conduct, and to introduce testimony of witnesses concerning the obloquy visited upon citizens and injury done our cherished rights by the actions of this purportedly legislative body. The issues of fact thus raised should be heard and disposed of by the court below before any determination is made regarding application of the Speech or Debate Clause.

(2)

Appellants Stamler and Hall adopt the position of appellant Cohen in Part III of the Jurisdictional Statement filed by him in this Court, that is, the Congressional appellees have waived any right or privilege afforded them by the Speech or Debate Clause.

(3)

We have summarized above how the majority below treated the Congressional appellees' motion to dismiss as a motion for summary judgment, without first affording appellants an opportunity to submit counter affidavits in accordance with the procedure established by F.R.C.P. 56(c). The unfair procedure adopted by the majority, without prior notice to appellants, does not meet the requirements of either the Federal Rules of Civil Procedure or the Due Process Clause. *Erlich* v. *Glasner,* 374 F.2d 681, 683 (9th Cir. 1967).

It is ironic that the court's reason for depriving appellants of their right to be heard is that "These cases were commenced more than three years ago." The age of the cases and the vast amount of time, effort and expense put into them by the courts, the parties and counsel would seem to call for careful adherence to orderly procedures, rather than precipitous dismissal of the case without affording appellants an opportunity to be heard.

At the very least the judgment appealed from should be reversed with directions that appellants be given an opportunity to submit counter affidavits to demonstrate that the conduct complained of on the part of the Committee was not legitimate legislative activity, and therefore is not immunized by the Speech or Debate Clause.

III.

IF PLENARY CONSIDERATION IS GIVEN TO THIS CASE, THE COURT SHOULD REVIEW THE IMPORTANT QUESTION OF WHETHER THE COMMITTEE'S CHARTER IS UNCONSTITUTIONAL ON ITS FACE.*

The Act of Congress which established the Committee was enacted in 1946 as a part of the Legislative Reorganization Act (60 Stat. 812, 828, Rule XI, 18(b)):

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (i) the extent, character and objects of un-American propaganda activities in the United States, (ii) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic

* The Court accepted this issue for review by its unlimited grant of certiorari in *Gojack* v. *United States*, 384 U.S. 702 (1966), but reversed on another ground.

origin and attacks the principle of the form of government as guaranteed by our Constitution, and (iii) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

Regarding this enactment, this Court said in *Watkins* v. *United States,* 354 U.S. 178, 202 (1957):

> "It would be difficult to imagine a less explicit authorizing resolution. Who can define the meaning of 'un-American'? What is that single, solitary 'principle of the form of government as guaranteed by our Constitution'?"

A.

The Vagueness of the Rule Chills Citizens in the Exercise of First Amendment Rights.

In *Barenblatt* v. *United States,* 360 U.S. 109 (1959), by a 5 to 4 vote, this Court upheld Rule XI against a charge of vagueness, holding that the Committee's activities over the years had shown that "the House has clothed the Un-American Activities Committee with pervasive authority to investigate Communist activities in this country", and that Rule XI, as applied to investigation of Communist influences in education, is not so vague as to deny adequate notice and due process.* (360 U.S. at 118.)

Since *Barenblatt,* however, a new understanding of the vice of vagueness in the First Amendment area has evolved under which the Court has declared unconstitutional many statutes like Rule XI whose vagueness "chills" the exer-

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* In *Barenblatt,* the vagueness attack was not couched in First Amendment terms. As the Court there said, "What we deal with here is whether petitioner was sufficiently apprised of 'the topic under inquiry' thus authorized 'and the connective reasoning whereby the precise questions asked relate[d] to it'." (360 U.S. at 124).

cise of First Amendment rights of citizens.*

Should the Court direct oral argument in this appeal, the issue of facial constitutionality of Rule XI should be re-examined in light of these post-*Barenblatt* decisions.

The controlling principles are expressed in *NAACP* v. *Button* and *Baggett* v. *Bullitt*:

> " . . . The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application.
>
> * * *
>
> " . . . Broad prophylactic rules in the area of free expression are suspect. [Citations omitted.] Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms." (371 U.S. at 432-33, 438.)
>
> "We are dealing with indefinite statutes whose terms, even narrowly construed, abut upon sensitive areas of basic First Amendment freedoms. The uncertain meanings of the oaths require the oath-taker—teachers and public servants— to 'steer far wider of

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* *Cramp* v. *Board of Public Instruction,* 368 U.S. 278 (1961) (Florida loyalty oath statute); *NAACP* v. *Button,* 371 U.S. 415 (1963) (Virginia anti-solicitation statute); *Baggett* v. *Bullitt,* 377 U.S. 360 (1964) (Washington State loyalty oaths); *Dombrowski* v. *Pfister,* 380 U.S. 479 (1965) (Louisiana statutes dealing with subversion and Communism); *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966) (Arizona State employee loyalty oath statute); *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967) (New York teacher loyalty oath statute); *Whitehill* v. *Elkins,* 389 U.S. 54 (1967) (Maryland teacher loyalty oath statute).

> the unlawful zone,' *Speiser* v. *Randall*, 357 U.S. 513, 526, than if the boundaries of the forbidden areas were clearly marked." (377 U.S. at 372.)

"Granting the vagueness of the Rule," the then majority of the Court in *Barenblatt* nevertheless held that because Rule XI had been interpreted by the Committee as applying at least to Communists, it was not vague as to Communists and could constitutionally be applied to them. (360 U.S. at 117-121.) However, this holding has been seriously undermined by the cases just discussed, and in particular by the holding in *Whitehall* v. *Elkins*, 389 U.S. 54 (1967). In *Whitehill*, this Court applied the newly formulated principles and held that a limited and definite intepretation—such as the interpretation which the *Barenblatt* majority attributed to Rule XI—will not cure an overly broad and vague statute in the First Amendment area. In striking down a Maryland teacher's oath statute despite restrictive state interpretations of the words "overthrow, destruction or alteration of the constitutional form of government . . . by revolution, force or violence" and "membership in a subversive organization,"* this Court said (389 U.S. at 59-60, 61-62):

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* Compare the similar phraseology of Rule XI, quoted above. The Committee itself recognizes the deficiencies of its charter, and has proposed a drastically revised charter. Supporting the adoption of the proposed revision, Rep. Ichord, a member of the Committee, addressed the House on July 19, 1968, as follows:

> "Admittedly [Rule XI] is extremely vague and ambiguous.
>
> * * *
>
> "Why become bogged down in argument and legal battles over whether activities are American or un-American when more precise language can be used." 114 Cong. Rec. H7092-3 (daily ed. July 19, 1968). (See also remarks of Rep. Ashbrook, 114 Cong. Rec. H6314-5 (daily ed. July 10, 1968).)

"We are in the First Amendment field. The continuing surveillance which this type of law places on teachers is hostile to academic freedom.

* * *

"The lines between permissible and impermissible conduct are quite indistinct. Precision and clarity are not present. Rather we find overbreadth that makes possible oppressive or capricious application as regimes change."

The principles laid down in these cases apply with full force to Rule XI.* Not only is violation of Committee subpoenaes punishable criminally, but receipt of and compliance with a Committee subpoena together with the attendant publicity and disruption of personal life constitutes a severe sanction. (See Appendix 4.) To avoid suffering those sanctions, citizens may be expected to tailor their conduct to "steer far wider of the unlawful zone," and, for fear of the consequences, to cease to engage in conduct which is *not* within the legitimate purview of the investigating committee, but which is nevertheless relentlessly "exposed" by the Committee. The upshot is a chill on freedom of expression and association and the diminution of vigorous debate on political, economic and social issues. To paraphrase *Keyishian,* " . . . the uncertainty as to the scope of [Rule XI's] proscriptions make it a highly efficient *in terrorem* mechanism." (385 U.S. at 601.)

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*As Justice Brennan recently said concurring in *United States* v. *Robel,* 389 U.S. 258, 275 (1967):

". . . the numerous deficiencies connected with vague legislative directives, *whether to a legislative committee,* to an executive officer, to a judge and jury or to private persons are far more serious when liberty and the exercise of fundamental rights are at stake." (Citations omitted, emphasis added.)

B.

Rule XI Is Couched In Such Broad Terms That It Encompasses Areas Which Extend Beyond The Investigatory Powers of Congress.

Even assuming that Rule XI could be given a meaning which precisely defines its scope, that scope is so broad as to include subjects of investigation upon which the Congress could not properly legislate. Therefore, the Rule offends the First Amendment.

Rule XI on its face authorizes the Committee to investigate "un-American" and "subversive" "propaganda" and "propaganda activities." It thus sanctions inquiries into political beliefs and associations, pure and simple. The majority in *Barenblatt* recognized this broad sweep, but nevertheless held (360 U.S. at 127-8):

> "That Congress has wide power to legislate in the field of Communist activity in this Country, and to conduct appropriate investigations in aid thereof, is hardly debatable.
>
> "[T]his Court in its constitutional adjudications has consistently refused to view the Communist Party as an ordinary political party, and has upheld federal legislation aimed at the Communist problem which in a different context would certainly have raised constitutional issues of the gravest character. [Citing cases] . . . this Court has recognized the close nexus between the Communist Party and violent overthrow of government."

However, under this Court's recent and controlling decisions — rendered since *Barenblatt* — political beliefs and associations alone, including Communist Party membership, may not be regulated, proscribed or punished absent a setting of *acts* which might be regulated. Accordingly, the sweeping inquiry authorized by Rule XI, even when

directed to Communist Party membership, can serve no legislative interest which counterbalances the strong interest of citizens in the protection of their First Amendment freedoms.

In *Schneider* v. *Smith,* 390 U.S. 17 (1968), this Court denied that the Congress had attempted to give the President authority to "probe the reading habits, political philosophy, beliefs, and attitudes on social and economic issues of prospective seamen on our merchant vessels." By way of contrast, the Court stressed that the statute relating to prevention of sabotage in the maritime industry speaks in terms of "actions", not beliefs or associations. (390 U.S. at 24-27.)

In *Keyishian* v. *Board of Regents,* 385 U.S. 589 (1967), this Court held unconstitutional a New York statute (previously upheld in *Adler* v. *Board of Education,* 342 U.S. 485 (1952)), making Communist Party membership *prima facie* evidence of disqualification to teach in public schools. Citing *Elfbrandt* v. *Russell,* 384 U.S. 11 (1966) and *Aptheker* v. *Secretary of State,* 378 U.S. 500 (1964), the Court said (385 U.S. at 606):

> "... mere knowing membership without a specific intent to further the unlawful aims of an organization is not a constitutionally adequate basis for exclusion from such positions as those held by appellants."

In *United States* v. *Robel,* 389 U.S. 258 (1967), this Court struck down as violative of the First Amendment a provision making it criminal to be employed in a defense facility while a member of the Communist Party. "The statute quite literally establishes guilt by association alone, without any need to establish that an individual's association poses the threat feared by the Government in proscribing it. . . . That statute casts its net across a broad range of associational activities, indiscrimi-

nately trapping membership which can be constitutionally punished and membership which cannot be so proscribed." (389 U.S. at 265-66.)

See also, *United States* v. *Brown,* 381 U.S. 437, 456 (1965), holding that Communist Party members cannot be presumed to be likely to engage in political strikes, thus limiting *American Communication Workers Ass'n.* v. *Douds,* 339 U.S. 382 (1950); *Shelton* v. *Tucker,* 364 U.S. 479, 485-90 (1960); *United States* v. *Rumely,* 345 U.S. 41, 46-47 (1953).

These recent decisions cast grave doubt upon the validity of Rule XI as written. If plenary consideration is accorded this case, this important question should be resolved.

C.

Rule XI Is a Bill of Attainder.

The Bill of Attainder Clause prohibits legislative punishment without a judicial trial. *United States* v. *Brown,* 381 U.S. 437, 447 (1965); *Cummings* v. *Missouri,* 71 U.S. (4 Wall) 277, 323 (1866); *United States* v. *Lovett,* 328 U.S. 303, 315 (1946).

Recently, this Court injected new scope and meaning into the Bill of Attainder Clause, in *United States* v. *Brown,* 381 U.S. 437 (1965) (Section 504 of the Labor-Management Reporting and Disclosure Act of 1959 barring Communists from union office held unconstitutional). The Court severely limited its previous decision in *American Communications Workers Ass'n.* v. *Douds,* 339 U.S. 382 (1950), and made it clear that the Bill of Attainder Clause should be given a liberal interpretation "in light of the evil the Framers sought to bar: legislative punishment,

of any form of severity, of specifically designated persons or groups." (381 U.S. at 447.) The Court pointed out that the Bill of Attainder Clause was intended to limit legislators "to the task of rule making" and to prevent them from carrying out the rules by imposing punishment. (381 U.S. at 445, 446.)

Rule XI has consistently been used to inflict punishment upon particular persons or groups without the benefit of judicial trial. Throughout its existence, the practices of the Committee have had a demonstrably unfavorable effect upon the lives of those it has chosen as its victims. (Appendix 4 to this brief.)

The gross mistreatment of appellants and the other subpoenaed witnesses at the 1965 Chicago hearings, summarized above, exemplifies the Committee's misconduct over the years, and its practice of imposing severe punishment without due process of law or the protections afforded by the judiciary.

Although this Court has not yet ruled upon the issue, three members of the Court expressed the opinion in *Barenblatt* v. *United States,* 360 U.S. 109 (1959), that Rule XI *is* a Bill of Attainder (360 U.S. at 153-4, 162, dissenting opinion). This issue should be addressed and resolved if plenary consideration is given this case.

D.

Rule XI Is Unconstitutional In That The Committee Purports To Act As A Grand Jury With Investigatory And Inquisitorial Powers.

It is a fundamental constitutional principle that legislative committees may not exercise the investigatory powers of grand juries, which are in their nature judicial. In

Kilbourn v. *Thompson,* 103 U.S. 168 (1881), a landmark case limiting the extent of congressional investigatory powers, this Court said (103 U.S. at 192):

> "In looking to the Preamble and Resolution under which the committee acted, before which Mr. Kilbourn refused to testify, we are of opinion that the House of Representatives not only exceeded the limit of its own authority, but assumed a power which could only be properly exercised by another branch of the government, because it was in its nature clearly judicial."

The *Kilbourn* case was summarized as follows by the Chief Justice in *Watkins,* 354 U.S. 178, 194 (1957):

> ". . . The Court found that the subject matter of the inquiry was 'in its nature clearly judicial and therefore one in respect to which no valid legislation could be enacted.' The House had thereby exceeded the limits of its own authority."

The Committee has assumed unto itself judicial and grand jury powers, by investigating alleged past nonconformist beliefs, deeds and associations of private citizens and groups, having no conceivable relationship to proposed legislation. This the Committee cannot do, nor may Congress authorize such investigations.

CONCLUSION

Plaintiffs-appellants respectfully submit that the issues presented herein are substantial, and that this Court should reverse the judgment below either summarily or after plenary consideration.

Respectfully submitted,

ALBERT E. JENNER, JR.
THOMAS P. SULLIVAN
CHESTER T. KAMIN
DAVID C. ROSTON
RONALD J. CLARK
135 S. LaSalle Street
Chicago, Illinois 60603

ARTHUR KINOY
NANCY STEARNS
511 Fifth Avenue
New York, New York 10017
Attorneys for Plaintiffs-Appellants Jeremiah Stamler, M.D. and Yolanda F. Hall

Of Counsel:
RAYMOND, MAYER, JENNER & BLOCK
135 S. LaSalle Street
Chicago, Illinois 60603

September 5, 1968

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APPENDIX

APPENDIX 1

Opinion of three-judge court, June 26, 1968.

MEMORANDUM OF DECISION

Before CUMMINGS, Circuit Judge, HOFFMAN and NAPOLI, District Judges.

The plaintiffs, Jeremiah Stamler, M.D., and Yolanda F. Hall, and the intervening plaintiff, Milton M. Cohen, (hereinafter referred to as "plaintiffs") brought two actions against the chairman and members of the Committee on Un-American Activities of the United States House of Representatives. The Committee had scheduled hearings at Chicago, Illinois, for May 25 through May 27, 1965, and the plaintiffs were subpoenaed to appear and give testimony.

The first action brought by the plaintiffs challenged the constitutionality of the Legislative Reorganization Act of 1946, 60 Stat. 812, 828 (1946) which embodies Rule XI of the Rules of the House of Representatives establishing the charter of the House Un-American Activities Committee. A three-judge District Court was requested under 28 U.S.C. §§ 2283, 2284 and the plaintiffs prayed for an injunction restraining the members of the committee from conducting any hearings and taking any action to enforce the subpoenas served upon the plaintiffs. The action was dismissed by the District Court for lack of substantial federal question under *Barenblatt* v. *United States*, 360 U.S. 109 (1959) and the application for a three-judge Court was denied.

The Committee conducted the scheduled hearings and the plaintiffs attended but refused to testify. The plaintiffs then commenced a second action, again challenging the

constitutionality of House Rule XI and requesting the convocation of a three-judge District Court. The plaintiffs prayed for a temporary and permanent injunction against the operation, enforcement or execution of House Rule XI and against the future prosecution of the plaintiffs for contempt of Congress under 2 U.S.C. § 192.

House Rule XI provides, in pertinent part:

> "The Committee on Un-American Activities, as a whole or by subcommittee, is authorized to make from time to time investigations of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation."

The complaint alleged that this Rule is illegal and void as applied to the plaintiffs, and as utilized by the defendants and their predecessors in the past, in that it violates the First, Fifth, Ninth and Tenth Amendments to the United States Constitution.

Without reaching the question of the substantiality of the constitutional issues, the District Court denied the application for a three-judge Court and dismissed the complaint for lack of justiciable controversy. The Court found that the plaintiffs lacked standing to raise the constitutional challenge to House Rule XI since they were not in the direct focus of the Rule. The Court concluded that the criminal prosecution feared by the plaintiffs was not possible until the full House of Representatives considered the facts and the Speaker of the House certified the facts

to the United States Attorney and directed him to bring the matter of contempt before the grand jury. 2 U.S.C. § 194. The District Court also noticed that criminal prosecution could be instituted only by the United States which was not a party to the action.

Appeals from the decisions of the District Court in both actions were taken to the Court of Appeals for the Seventh Circuit. The reviewing court reversed upon concluding that in deciding the question of justiciability in the second action the District Court had improperly considered the merits of the plaintiffs' claim and that both complaints presented a substantial constitutional question. *Stamler v. Willis*, 371 F.2d 413 (7th Cir. 1966). The Court stated:

> "The complaints alleged generally that the interpretation of section 18 of Rule XI as expressed by the continued conduct of the Subcommittee of the House Un-American Activities Committee attributes a meaning to the rule which renders it unconstitutional, and that this conduct consisted of the exposure of witnesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights.
>
> "These allegations raise a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States*, 360 U.S. 109 (1959)." 371 F.2d at 414.

The Court also noted that the complaints alleged, at least formally, a basis for equitable relief and that the requirements of the three-judge statute had been met. The cases were remanded to the District Court with directions to grant the requests for a three-judge Court.

After remand, the three-judge District Court was appointed and the cases were consolidated for trial. During the summer of 1967 the plaintiffs moved for a temporary restraining order preventing the defendants from seeking to secure indictments against them for violations of 2 U.S.C. § 192. The motion was presented to the single District Judge who was advised that the previous fall the Speaker of the House of Representatives had certified facts constituting the alleged illegal conduct of the plaintiffs to the United States Attorney and that the Attorney General and the United States Attorney were going to present the alleged contempt charges to the grand jury. While this motion was under advisement, the plaintiffs moved for leave to file a First Supplement to the Complaints indicating the action taken by the House of Representatives and for leave to add the United States Attorney and the Attorney General as parties defendant. Leave to file the Supplement was granted but the motion to add additional parties was denied. Thereafter the single Judge denied the motion for a restraining order and the plaintiffs were indicted for contempt of Congress in violation of 2 U.S.C. § 192. The initiation of the criminal prosecutions was pleaded in a Second Supplement to the Complaints and the plaintiffs prayed for an injunction against the prosecutions. Leave to file the Second Supplement and to add the Attorney General and the United States Attorney as parties defendant was allowed. The criminal actions are pending.

The Congressional defendants moved to dismiss the complaints as supplemented and that motion was denied. All the defendants then answered and filed a motion for summary judgment and several discovery motions which were taken under advisement. Next the Congressional defendants moved to stay discovery and to dismiss the actions

for lack of jurisdiction on the ground that they are immune from suit under the Speech or Debate Clause, United States Constitution, Article 1, § 6, Clause 1. All nine Congressional defendants filed Claims of Privilege and Exemption from Suit. The cases are now before the Court for decision on the motion of all defendants for summary judgment, two discovery motions and the Congressional defendants' motion to stay discovery and dismiss the complaints.

The issue raised by the pending motion to dismiss the actions as to the Congressional defendants is the availability to them of the immunity granted legislators under the Speech or Debate Clause. That Clause provides: "[F]or any Speech or Debate in either House [the members of Congress] shall not be questioned in any other place." The defendants urge their claimed immunity as a jurisdictional impediment to the present actions which seek injunctive relief against them based on alleged legitimate legislative activities. Reliance is placed on the opinion of Judge Burger in *Powell* v. *McCormack*, ... F.2d ..... (D.C. Cir. Feb. 28, 1968). In that case the plaintiff, Member-Elect Adam Clayton Powell, Jr., brought suit against several members of the 90th Congress to restrain the enforcement, operation or execution of House Resolution No. 278 whereby Member-Elect Powell was excluded from membership in the 90th Congress, and to restrain the defendants and the full House of Representatives from taking any action to enforce House Resolution No. 278. Judge Burger reached the conclusion that the Speech or Debate Clause operated as a bar to the maintenance of Mr. Powell's suit.

The Speech or Debate Clause has been the subject of only four Supreme Court decisions: *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Tenney* v. *Brandhove*, 341 U.S. 367

(1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); and *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967). These cases teach that the Clause confers personal immunity on members of Congress to protect the legislative process in our system of government, and that the Clause must be read broadly to effectuate its purposes. Under these cases Congressmen are insulated from criminal sanction and civil liability if they are engaged in legitimate legislative activity such as the conduct of Congressional committee hearings. However, the Supreme Court has not decided the questions raised by the present motion to dismiss. Those questions are whether the legislative immunity provided by the Speech or Debate Clause may be asserted in an action seeking only equitable relief and a declaratory judgment, and in an action brought to redress a deprivation of First Amendment rights.

The nature of the remedy sought by a litigant does not determine whether the legislator engaged in legitimate legislative activity shall be called to answer before the Judiciary. The Clause must operate to prevent intimidation by the executive and accountability before a possibly hostile judiciary. *United States* v. *Johnson, supra*, at 181. The doctrine of immunity should protect the legislator not only from the consequences of the results of the litigation, but also from the burden of defending himself. *Dombrowski* v. *Eastland, supra* at 85. The Clause itself is the only constitutional provision wherein the doctrine of separation of powers is explicit and its history indicates that any matter concerning either House of Congress should be examined and adjudged in the House to which it relates, and not elsewhere. The precedents, the history of the provision and the required broad reading of the Clause dictate the

conclusion that the kind of relief prayed against the legislator has no effect on the availability of the defense of immunity.

The conflict between First Amendment rights and legislative action was examined in *Bond* v. *Floyd*, 385 U.S. 116 (1966). In that case the question was whether a state House of Representatives could constitutionally exclude a duly elected Representative from membership because of his statements criticizing the policy of the Federal Government. The Court found that the disqualification of the plaintiff Bond from the Georgia House of Representatives violated the plaintiff's right of free expression under the First Amendment. The basis of the Court's decision was the First Amendment requirement that legislators be given the widest latitude to express their views on issues of policy. However, the defendants did not raise the issue of legislative immunity under the equivalent of the Speech or Debate Clause in the Georgia Constitution and the Court did not consider the collision of the plaintiff's First Amendment rights as a legislator and the defendants' similar rights under a specific constitutional provision.

In the cases at bar, we are confronted with an asserted deprivation of First Amendment rights and the constitutional doctrine of legislative immunity. We find that the freedom of expression protected by the Speech or Debate Clause outweighs the similar protection of the First Amendment. The mandate of the Speech or Debate Clause is explicit: A member of Congress shall not be required to answer in the courts for any speech within the scope of his legislative activity. If that speech impinges upon another's First Amendment rights, the former must prevail. The balance of the rights pleaded by the parties favors the Congressional defendants.

The more vital question presented by the motion to dismiss is whether the Congressional defendants were engaged in legitimate legislative activity. The Congressional defendants have been charged with "pillorying" the plaintiffs and other witnesses who have appeared before the Committee, exposing them to public scorn and obloquy, harassment and intimidation with the purpose of deterring them and others in the exercise of their First Amendment rights. Further the plaintiffs complain that the continued conduct of the Committee members attributes a meaning to House Rule XI which renders it unconstitutional.

Essentially the plaintiffs challenge the motive of the defendants. The Court cannot act on this challenge and probe the motivation of the individual legislator; "[t]he claim of an unworthy purpose does not destroy the [Speech or Debate] privilege." *Tenney* v. *Brandhove, supra* at 377. Rather, in determining whether the defendants were engaged in legitimate legislative activity, the Court should only determine whether the Committee's inquiry may fairly be deemed within its province. The Supreme Court has held:

> "Investigations, whether by standing or special committees, are an established part of representative government. Legislative committees have been charged with losing sight of their duty of disinterestedness. In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses. The courts should not go beyond the narrow confines of determining that a committee's inquiry may fairly be deemed within its province. To find that a committee's investigation has exceeded the bounds of legislative power it must be obvious that

there was a usurpation of functions exclusively vested in the Judiciary or the Executive." *Tenney* v. *Brandhove, supra,* at 377-378.

We reach the conclusion that the Chicago hearings conducted by the defendants may fairly be deemed within the province of the Committee. The transcripts of the hearings are attached as exhibits to the complaint filed in the second action and the defendants have filed, in support of the motion for summary judgment, copies of the House reports certifying the facts leading to the Committee request that the plaintiffs herein be cited for contempt and including the underlying resolution and authority of the subcommittee to hold the Chicago hearings, and the background of the witnesses on which was based the Committee decision to subpoena them. These exhibits do not disprove the plaintiffs' allegations that the conduct of the Committee gives an unconstitutional gloss to House Rule XI, but they establish that the Chicago hearings may fairly be deemed to be within the province of the Committee. The questions are not the same. We conclude that the hearings conducted by the defendants constituted legitimate legislative activity.

The defendants raise the immunity under the Speech or Debate provision as a bar to this Court's jurisdiction. Although Judge Burger's opinion supports this view, we disagree and note that the issue has not been decided by the Supreme Court. In order for the Speech or Debate Clause to protect a legislator, it must be demonstrated that he is engaged in legitimate legislative activity. The determination of such a question is more appropriate in a summary judgment setting. Therefore, we have treated the Claims of Privilege and Exemption from Suit as affirmative defenses to the actions and find, on the defendants'

motion for summary judgment, that the Speech or Debate Clause is a complete legal defense to both actions. In view of the fact that these cases were commenced more than three years ago, the Court will not require amended pleadings or new motions for summary judgment presenting the defense of immunity to the Court. We will treat the motion of the Congressional defendants to stay discovery and dismiss the actions under the pending motion for summary judgment and allow both motions of the Congressional defendants. The relief sought against the Attorney General and the United States Attorney is ancillary to the claims against the Congressional defendants and the actions will be dismissed as to the Attorney General and the United States Attorney. The remaining motions will be denied as moot.

/s/ *Julius J. Hoffman*
United States District Judge
/s/ *Alexander J. Napoli*
United States District Judge

Dated: June 26, 1968

CUMMINGS, *Circuit Judge,* dissenting. The majority rests its decision on the Speech or Debate Clause contained in Article I, Section 6, Clause 1 of the Constitution, providing "The Senators and Representatives * * * for any Speech, Debate in either House * * * shall not be questioned in any other Place."[1] This clause is derived from the 1689 English Bill of Rights providing:

> "That the freedom of Speech and Debate or proceedings in Parliament ought not to be impeached or questioned in any Court or Place out of Parliament."

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[1] By not raising this privilege or immunity in their Answer, which raised nine affirmative defenses, the Congressional defendants have waived it. But since the majority has seen fit to pass upon the merits of this defense, it will also be considered in this dissent.

This privilege was chiefly intended to protect members of Parliament from criminal charges and libel or slander actions. See *United States* v. *Johnson,* 383 U.S. 169, 182; *The Bribed Congressman's Immunity from Prosecution,* 75 Yale L.J. 335, 341-342 (1965).

In this country, a similar clause in the Massachusetts Constitution of 1780 was first construed in *Coffin* v. *Coffin,* 4 Mass. 1, 27 (1808), a slander suit, as enabling members of the legislature "to execute the functions of their office without fear of prosecutions, civil or criminal." At two other places in his opinion, Chief Justice Parsons refers to freedom from "prosecutions." Of course, prosecutions are not involved in the present suit for injunctive and declaratory relief.

The Supreme Court's first consideration of the Speech and Debate Clause came in *Kilbourn* v. *Thompson,* 103 U.S. 169, where it was deemed to give members of a congressional committee a defense against a suit for damages brought by a person imprisoned for failure to answer certain committee questions and to produce books and papers sought by the committee. In *Kilbourn,* the Court refused to limit this constitutional provision to words spoken in debate, but nevertheless confined its decision to "what is necessary to the case at hand," stating:

> "It is not necessary to decide here that there may not be things done, in the one House or the other, of an extraordinary character, for which the members who take part in the act may be held legally responsible." See 103 U.S. pp. 204-205.

The next Supreme Court consideration of this clause came in another suit where the plaintiff sought damages from members of a legislature. *Tenney* v. *Brandhove,* 341 U.S. 367. There Justice Frankfurter concluded that the

clause applied to immunize legislators from such actions if "from the pleadings it appears that the defendants were acting in the sphere of legitimate legislative activity" (at p. 376). After stating that the purpose of the clause was to free members of the legislatures from "criminal and civil liability," the *Tenney* opinion adhered to the caveat expressed in the *Kilbourn* case that members of the legislature might be held responsible for doing things "of an extraordinary character" (at pp. 375, 378).

The Supreme Court again considered this clause in *United States* v. *Johnson,* 383 U.S. 169, where it was applied to bar a criminal prosecution against a former congressman. Again the Court was careful to limit its holding to the circumstances presented (at p. 185).

The last Supreme Court consideration of this clause occurred in the *per curiam* opinion in *Dombrowski* v. *Eastland,* 387 U.S. 82, another damage action. The Court reiterated the *Tenney* concept that legislators should be protected from the burden of defending themselves when engaged "in the sphere of legitimate legislative activity" (p. 85). In contrast, here the Congressional defendants are being fully defended by the Government, as provided by 2 U.S.C. § 118, with no possibility of monetary liability.

This review of the leading authorities construing the Speech or Debate Clause shows that until today no court has applied it to an action seeking injunctive or declaratory relief. It is true that in *Powell* v. *McCormack,* ..... F.2d ..... (D.C. Cir. 1968), Judge Burger concluded that the clause applied to an action seeking equitable relief, but neither Judge McGowan nor Judge Leventhal agreed with him, and they reached certain aspects of the merits of the *Powell* complaint.

In my view, the immunity extended by the Speech or Debate Clause is limited to judicial proceedings in which individual legislators are sought to be rendered personally liable, civilly or criminally, for activities stemming from a privileged range of conduct. The immunity does not extend to actions for declaratory and injunctive relief in which, as here, Congressmen are only parties in their official capacity.

As explained in *United States* v. *Johnson, supra,* p. 180, the state legislators' privilege is on a parity with the federal privilege arising from the Speech or Debate Clause. In fact, at least 43 states have constitutional provisions equivalent to that clause. (See *Tenney* v. *Brandhove, supra,* at p. 375, note 1; 1 Alaska Stats. p. 231; Rev. Laws of Hawaii, 1963 Supp. p. 11.) Despite such state constitutional provisions, injunctive relief has often been accorded against members of state legislatures, showing that injunctive relief is also not barred by the Speech or Debate Clause of the federal Constitution. Thus in *Dombrowski* v. *Pfister,* 380 U.S. 479, it was held that the plaintiffs were entitled to declaratory and injunctive relief against the chairman of a joint committee of the legislature and others. A few years later, in *Bond* v. *Floyd,* 385 U.S. 116, the Court again held that a plaintiff was entitled to declaratory and injunctive relief against members of a state legislature even though the Supreme Court of Georgia had interpreted its Speech or Debate Clause as barring actions for declaratory relief against legislators. *Village of North Atlanta* v. *Cook,* 219 Ga. 316, 133 S.E.2d 585 (1963). The rationale of the *Dombrowski* and *Bond* decisions applies equally to members of the United States House of Representatives.

Similarly, in *Liveright* v. *Joint Committee,* 279 F.Supp. 215 (M.D. Tenn. 1968), an injunction was entered against members of a joint committee of the Tennessee Assembly and other members of the legislature, restraining them from proceeding under a vague and overbroad resolution (narrower than Rule XI) authorizing the investigation of the Highlander Research Center of Knox County. To like effect, see *Bush* v. *Orleans Parish School Board,* 191 F.Supp. 871 (E.D. La. 1961), affirmed, 367 U.S. 908; *Jordan* v. *Hutcheson,* 323 F.2d 597, 601-602 (4th Cir. 1963).

Thus in the foregoing cases, the Supreme Court and other federal courts have approved declaratory and injunctive relief against legislators. The instant decision is the first known Speech or Debate Clause ruling to the contrary.

Under the allegations of this complaint, the House Committee on Un-American Activities has engaged in a consistent course of conduct whose effect is to stifle freedom of association and criticism of the government.[2] The Speech or Debate Clause was designed to encourage just such criticism. Its prophylactic purpose reflected "the central importance to our political system of uninhibited political expression as guaranteed to the general populace by the First and Fourteenth Amendments." *United States* v. *Johnson, supra,* at p. 182, note 12. Its purpose should not be subverted by employing it to deny relief to these plaintiffs. This is especially true when the clause has never before been applied to actions for injunctive or declaratory relief in the nearly 180 years of its operation. In fact, the

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[2] Unlike *Tenney* v. *Brandhove, supra,* the motives of these Congressional defendants are nowhere challenged. It is the effect of their conduct that is at issue here, not their motives.

novelty of the Government's position is shown by its not having raised this clause during the first two and one-half years this case has been pending!

Even assuming *arguendo* the correctness of Judge Burger's views in *Powell* v. *McCormack,* that case is not controlling here. There the relief sought would force the seating of Congressman-Elect Powell, whereas if these plaintiffs should prevail on the merits, Congress could enact a narrower enabling Act and continue its investigations thereunder. In *Powell,* the plaintiff had no alternative way of presenting his constitutional claim in a judicial proceeding, whereas here the majority opinion admits that these plaintiffs' constitutional claims can be entertained in their criminal trials. If they should prevail on this point in those trials, the result would in effect be a judicial decision that Rule XI is unconstitutionally broad, the very result sought here. An unfavorable decision here would signify no less respect for a coordinate branch of the Government than would a like decision in the criminal prosecutions. The fact that plaintiffs can test the issues presented here in their criminal prosecutions is no reason to deny them standing in this proceeding. *Flast* v. *Cohen,* 36 U.S. Law Week 4601. As Judge Medina observed in *Wolff* v. *Selective Service Local Board No. 16,* 372 F.2d 817, 824-825 (2d Cir. 1967):

> "Where basic constitutional rights are imperiled, the courts have not required a series of injured parties to litigate the permissible scope of the statute or administrative interpretation but have nullified the unconstitutional action and required the Government to start in the first instance with a statute or interpretation that will not so overhang free expression that the legitimate exercise of constitutionally protected rights is suppressed."

There *Dombrowski* v. *Pfister, supra,* was applied to prevent federal interference with First Amendment rights (at p. 824).

In sum, the Speech or Debate Clause protects legislators from imprisonment or money judgments that would adversely affect their ability to perform their Congressional duties. But if these plaintiffs were to prevail in this case, the defendant members of Congress would not be impeded in their Congressional functions but merely have to conduct their future investigations under a narrower, constitutional mandate. Thus permitting this action to proceed will have no chilling effect on the legislators' performance of their duties. Cf. Note, 78 Harv. L. Rev. 1473, 1475 (1965).

The Court of Appeals for this Circuit has previously recognized the different impact of damages and injunctive actions, stating as follows in *Adams* v. *City of Park Ridge,* 293 F.2d 585, 587 (7th Cir. 1961):

> " * * * the case at bar is not an action for damages for torts committed. It looks to the future only and asks for a declaratory judgment and an injunction against invasions of plaintiffs' federal constitutional rights contemplated by a municipality's ordinance. None of the reasons which supports a city's immunity from an action for damages for tortious injuries already inflicted by its officers, agents or servants applies to this case. No reason is apparent why a city and its officials should not be restrained from prospectively violating plaintiffs' constitutional rights pursuant to its own legislative enactment, and an injunction not be granted as provided in §1983."

Similarly here, the reasons supporting Congressional immunity in criminal prosecutions or in damage actions do not apply to this case. Cf. *Flast* v. *Cohen,* 36 U.S. Law Week 4601, 4610, n. 6 (concurring opinion).

By belated resort to the Speech or Debate Clause, this Court should not evade the mandate of *Stamler* v. *Willis*, 371 F.2d 413 (7th Cir. 1966), holding that this complaint presents a substantial constitutional question, and that the breadth of Rule XI should be measured against this Committee's conduct over the years. Cf. *Watkins* v. *United States*, 354 U.S. 178, 198, 202; *Gojack* v. *United States*, 384 U.S. 702, 711-712. The *Stamler* opinion contemplated that this judicial re-examination was to occur in this proceeding rather than in subsequent criminal proceedings. By settling the questions raised by this complaint in this civil proceeding, future interference with Committee activity would be eliminated. Unlike the now pending criminal prosecutions, more suitable discovery procedures and more liberal rules of evidence are available here to throw light on the serious constitutional questions presented. These questions are surely weighty enough to call for adjudication by three judges rather than a single judge hearing the criminal cases. Moreover, direct Supreme Court resolution is available upon appeal from the judgment on the merits by this 3-judge court. See *Zemel* v. *Rusk*, 381 U.S. 1, 5-7. Defendants have not shown why defense of this proceeding would be significantly more burdensome than would their cooperation in the prosecution of these plaintiffs under 2 U.S.C. § 192.

These plaintiffs, like those in *Dombrowski* v. *Pfister*, 380 U.S. 479, should be permitted to raise these questions in a civil proceeding not inhibiting the full exercise of their First Amendment rights. They should not have to go through years of criminal litigation as in *Gojack* v. *United States*, 384 U.S. 702, where the defendant had to stand trial twice, was convicted twice, appealed unsuccessfully twice, obtained a new trial from the Supreme Court and finally the dismissal of charges against him in the Supreme Court.

Even more than in *Dombrowski* v. *Pfister, supra,* these plaintiffs are entitled to an adjudication of their civil complaint. There the allegedly overbroad statute was new and had not been judicially construed, so that any threat to free expression might have been obviated *ad limine.* Here it is alleged that the interpretation put on Rule XI during the approximately 30 years of the Committee's existence exacerbates the overbreadth of the Rule, and it has already been held that plaintiffs' allegations raise a substantial constitutional question (*Stamler* v. *Willis, supra).* Therefore, *Dombrowski* surely requires this Court to permit this civil litigation to proceed.

In denying the Government's motion to dismiss, this Court has already determined that plaintiffs' claims should be considered on their merits even though a coordinate branch of the Government is involved. The judiciary has always borne the basic responsibility for protecting individuals against unconstitutional invasions of their rights by all branches of the Government.[3] Thus the Supreme Court has overturned a major policy decision of the President because he exceeded his powers in seizing the steel mills. *Youngstown Sheet & Tube Co.* v. *Sawyer,* 343 U.S. 579. More recently, the Court has ruled that an Act of Congress designed to prevent members of the Communist Party from holding jobs in defense facilities, and action taken pursuant to that Act by the Secretary of Defense, was unconstitutional because it placed a greater restraint on First Amendment freedoms than was necessary to guard against espionage and sabotage. *United States* v. *Robel,* 389 U.S. 258. Although the Speech or Debate Clause protects individual legislators against personal liability for

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[3] See *Legislative Exclusion: Julian Bond and Adam Clayton Powell,* 35 Univ. of Chi. L. Rev. 151, 164-166 (1967).

their legislative acts, it cannot foreclose judicial inquiry into the constitutionality of the Committee of which they are members. The Congress has no more right, whether through legislation or investigations conducted under an overbroad enabling Act, to abridge the First Amendment freedoms of the people than do the other branches of government, "For free expression — of transcendent value to all society, and not merely to those exercising their rights — might be the loser." *Dombrowski* v. *Pfister, supra,* at p. 486.

As shown in the *Tenney* case, and reiterated in *Dombrowski* v. *Eastland, supra,* the Speech or Debate Clause was meant to apply to legislators engaged in the sphere of legitimate legislative activity. In *Stamler* v. *Willis*, 371 F.2d 413 (7th Cir. 1966), the Court decided there was a substantial question whether these legislators were so engaged. In that vein, this Court has already unanimously denied the Government's motion to dismiss and permitted limited discovery and should not now back-track from the forthright position previously taken merely to avoid passing upon the difficult and weighty questions presented.

The majority states that the action against the Attorney General and the United States Attorney must fall with the action against the Congressional defendants because the actions against the former are "ancillary." But as early as *Stockdale* v. *Hansard,* 9 Ad. & El. 1 (1839), and certainly by the time of *Kilbourn* v. *Thompson, supra,* it was clearly established that liability, including personal tort liability, could be imposed on an official for following orders given to him by the Congress, even though the Congressmen could not be held. This is exactly what

happened to the Sergeant-at-Arms of the House in *Kilbourn.* The principle was recently reaffirmed in *Dombrowski* v. *Eastland,* 387 U.S. 82, where the Supreme Court ordered that a tort action go to trial as against Senate Subcommittee Counsel Sourwine, while at the same time dismissing the action as against Senator Eastland. There is therefore no legal bar to the continuation of this action as against defendants Clark and Foran. I would hold that this action should proceed against the Congressional defendants as well.

For these reasons, I am unable to join in the judgment order being entered.

/s/ *Walter J. Cummings*
United States Circuit Judge

Dated: June 26, 1968

APPENDIX 2

Judgment entered June 26, 1968.

These consolidated causes coming on to be heard on the plaintiffs' and the intervening plaintiff's Complaints and First and Second Supplements thereto, the Answers of the defendants, the motion of all defendants for summary judgment, and the following motions of the Congressional defendants: (1) Motion to stay discovery and dismiss the causes; (2) Motion to exclude certain defendants from discovery orders; and (3) Motion to bar the plaintiffs from deposing Committee employee McNamara and for a protective order to cover the depositions of Committee employees Wetterman and Sweeney; and the Court, consisting of three Judges convened pursuant to law, having considered the pleadings and motions of the parties, the briefs of counsel, the materials submitted in support of the motion for summary judgment and the Claims of Privilege and Exemption from Suit filed by the Congressional defendants as exhibits to their motion to stay discovery and dismiss the causes; and the Court having this day filed its Memorandum of Decision, and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED as follows:

1. That the motion of the Congressional defendants to stay discovery and dismiss the causes be considered in conjunction with the defendants' motion for summary judgment;

2. That the motion of the Congressional defendants for summary judgment and the motion of the Congressional defendants to stay discovery and dismiss the consolidated causes be and the same hereby are allowed;

3. That the consolidated causes be and the same are hereby dismissed as to the remaining defendants;

4. That all other motions pending presently before the court be and the same are hereby denied as moot;

5. That the consolidated causes be and the same hereby are dismissed.

ENTER'

/s/ *Julius J. Hoffman*
United States District Judge
/s/ *Alexander J. Napoli*
United States District Judge

DATED: June 26, 1968

APPENDIX 3

Opinion of Court of Appeals for Seventh Circuit in Stamler v. Willis, 371 F.2d 413 (7th Cir. 1966).

Before KNOCH, KILEY and CUMMINGS, *Circuit Judges.*

KILEY, *Circuit Judge.* Plaintiffs appeal from a judgment of the district court denying their motion for a three-judge court[1] and dismissing their complaints. We order the judgment vacated.[2]

Since this court has no greater jurisdiction in this case than the single district judge, the sole question is whether the complaints presented a substantial constitutional question so as to deprive the district court of jurisdiction to dismiss the complaints.

The district court did not reach this question, but dismissed on the basis of rulings on "threshold questions" as to the propriety of a decision on the merits. But in our view, the district court, in reaching its conclusions on the "threshold questions," relied in part upon the decisions on the merits of the case presented and in doing so exceeded the single-judge preliminary inquiry jurisdiction. We think that if the complaints present a substantial con-

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[1] 28 U.S.C. § 2282 (1964):

> An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under Section 2284 of this title.

[2] Since the issues raised by the first complaints, filed the day before the hearings, are substantially the same as those raised by the second complaints, we need discuss only the second.

stitutional question, the three-judge court request ought to be granted, since there is no doubt that the complaints "at least formally allege a basis for equitable relief . . ." and that "the case presented otherwise comes within the requirements of the three-judge statute."[3] *Idlewild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S. 713, 715 (1962).

The complaints alleged generally that the interpretation of section 18 of Rule XI[4] as expressed by the continued conduct of the Subcommittee of the House Un-American Activities Committee attributes a meaning to the rule which renders it unconstitutional, and that this conduct consisted of the exposure of witnesses, including plaintiffs, to public scorn and obloquy and harassment and intimidation of these witnesses without any legislative purpose but rather to chill and deter them and others in the exercise of their first amendment rights.

These allegations raise a substantial constitutional question not foreclosed by the Supreme Court in *Barenblatt* v. *United States,* 360 U.S. 109 (1959).

In *Barenblatt* the Court rejected the contention that Rule XI was unconstitutionally vague in delineating the limits of Subcommittee inquiry when judged, as it must be, in the concrete. The Court held that the Committee's history and the "persuasive gloss of legislative history"

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[3] There is no doubt that a single district judge, where a three-judge court is requested, may consider the question of his own jurisdiction in an appropriate case. *E.g., Lion Mfg. Corp.* v. *Kennedy,* 330 F.2d 833 (D.C. Cir. 1964).

[4] Legislative Reorganization Act of 1946, 60 Stat. 812, 818, as adopted by the Eighty-Ninth Congress. H.R. 8, 89th Cong., 1st Sess., 111 CONG. REC. 21 (1965).

disclosed authority, unassailable on grounds of vagueness to investigate Communist influence in education. 360 U.S. at 122. On the issue of violation of first amendment rights, the Court said "there is no indication in this record that the Subcommittee was attempting to pillory witnesses." 360 U.S. at 134. Here it is alleged that Rule XI, section 18, is unconstitutional as continually interpreted by the Subcommittee to justify the effectual "pillorying" of plaintiffs and other witnesses.[5] We think the Court's language in *Gojack* v. *United States*, 384 U.S. 702 (1966), supports our conclusion that the complaints raise a question not foreclosed by *Barenblatt*: "*In the circumstances of that case* [*Barenblatt*], the Court sustained the constitutionality of the investigation. . . ." (Emphasis added.) *Id.* at 706. We hold that a substantial constitutional question was presented and that the district court had no jurisdiction to dismiss the complaints.

The cause is remanded with directions to vacate the judgment and to grant the request for a three-judge court.

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[5] Because of the allegations here of the Subcommittee conduct giving an unconstitutional meaning to the statute, this case is distinguished from those where unconstitutional conduct under color of a valid statute is alleged. *Ex parte Bransford*, 310 U.S. 354 (1940). It is well established that the meaning of a statute must not be derived solely from its abstract terms, "unrelated to the definite content furnished them by the course of congressional actions." *Barenblatt* v. *United States*, 360 U.S. 109, 117 (1959).

KNOCH, *Circuit Judge.* (dissenting) Reluctantly I find myself in disagreement with my colleagues. It seems to me that the District Judge properly considered the threshold questions of standing to sue and the propriety of the remedies sought. As indicated in his original ruling involved in appeals Nos. 15268 and 15269, he was of the opinion that a substantial constitutional question had not been presented at that time. Similarly, there is an indication that he was still of that opinion in deciding the later petitions involved in appeals Nos. 15668 and 15669, although he disposed of the matters on the announced threshold grounds. I believe that his actions were correct and his disposition of the matter should be affirmed.